

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEANGELO LAMONT THOMAS,

Defendant-Appellant.

UNPUBLISHED

January 25, 2007

No. 258394

Wayne Circuit Court

LC No. 04-003659-01

Before: Fort Hood, P.J., and Talbot and Servitto, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial convictions for assault with intent to murder Mario Tait (Mario), MCL 750.83, discharging a weapon at a dwelling, MCL 750.234b, discharging a weapon from a motor vehicle, MCL 750.234a, carrying a firearm with unlawful intent, MCL 750.226, felon in possession of a firearm, MCL 750.224a, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was acquitted of assault with intent murder Robert Tait (Robert). Defendant was sentenced, as a fourth habitual offender, MCL 769.12, to a two-year term of imprisonment for the felony-firearm conviction, to be served consecutive to his sentences of 17 to 30 years' imprisonment for the assault with intent to murder conviction, one to four years' imprisonment for the convictions for discharging a firearm at a dwelling and from a motor vehicle, and one to five years' imprisonment for the convictions of carrying a firearm with unlawful intent and being a felon in possession of a firearm. We affirm.

Defendant challenges his trial counsel's performance for failing to object at trial to the admission of Mario's earlier testimony given during an investigative subpoena deposition. In the alternative, defendant contends that defense counsel should have sought the redaction of the deposition before its admission and should have cross-examined Mario in greater detail regarding the inconsistencies in his testimony. Defendant failed to move for a new trial in the trial court based on the ineffective assistance of counsel. However, this Court remanded to the trial court to conduct an evidentiary hearing regarding counsel's performance upon defendant's motion. *People v Thomas*, unpublished order of the Court of Appeals, entered June 29, 2005 (Docket No. 258394). Because defendant filed a motion to remand for a *Ginther*¹ hearing, which

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

was actually conducted, his challenge to trial counsel's performance is preserved for appellate review. See *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

The trial court denied defendant's motion for a new trial following remand from this Court for a *Ginther* hearing. We review a trial court's determination regarding a motion for new trial for an abuse of discretion. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003). This Court reviews a trial court's findings of fact for clear error, MCR 2.613(C), and conclusions of constitutional law de novo. *People v Hickman*, 470 Mich 602, 605; 684 NW2d 267 (2004). Effective assistance of counsel is presumed and defendant bears a heavy burden to prove otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). To establish ineffective assistance of counsel, defendant must prove that counsel's deficient performance denied him the Sixth Amendment right to counsel and that, but for counsel's errors, the proceedings would have resulted differently. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001).

Defendant first contends that defense counsel was ineffective for failing to object to the admission of Mario's investigative subpoena deposition testimony. As a general rule, out-of-court statements are considered inadmissible hearsay and may not be admitted as substantive evidence. MRE 801(c); *People v Chavies*, 234 Mich App 274, 281; 593 NW2d 655 (1999), overruled in part on other grounds *People v Williams*, 475 Mich 245; 716 NW2d 208 (2006). However, a witness's prior inconsistent statement may be admitted to establish the truth of the matter asserted if the witness is available for cross-examination at trial regarding the statement and if that prior statement "was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition" MRE 801(d)(1)(A). In this case, Mario's testimony at the investigative subpoena deposition was given under oath. Mario's deposition testimony was clearly inconsistent with his trial testimony. Mario testified at the deposition that he saw defendant leaving the scene of the shooting and that defendant called afterward threatening further violence. However, at trial, Mario testified that he did not see the perpetrator and claimed that defendant was "surprised" by the news of the shooting. Mario testified at trial and, therefore, was available for cross-examination regarding his prior statement. Accordingly, the investigative subpoena deposition was admissible at defendant's trial as substantive evidence.

In *Chavies*, *supra* at 282-283, this Court similarly upheld the admission of witness testimony given before a grand jury. When a witness testifies at trial, he or she is available for cross-examination regarding his or her prior statements. Therefore, the defendant's right to confront the witnesses against him is protected. *Id.* at 283. The defendant in *Chavies* argued that his conviction was based on insufficient evidence because it was based on the witnesses' grand jury testimony during which they were not subject to cross-examination. *Id.* at 284. This Court disagreed and found that an uncorroborated prior inconsistent statement may, standing alone, form the basis of a conviction. *Id.* at 288-289. In such a case, the defendant's right to confront the witnesses against him is protected by the witnesses taking the oath, the right to cross-examine the witnesses at trial, and the jury's ability to observe the witnesses' live testimony. *Id.* at 289.

Defendant also challenges defense counsel's failure to seek the redaction of the investigative subpoena deposition. Because of counsel's failure, defendant argues that the trial court was privy to various hearsay statements, statements made without personal knowledge, and irrelevant testimony.

At the *Ginther* hearing, defense counsel testified that she did not seek the redaction of the investigative subpoena deposition testimony because her hearsay objections at the preliminary examination had been unsuccessful. At the preliminary examination, the prosecutor argued that the deposition testimony was not hearsay under MRE 801(d)(1)(A). Defense counsel countered that both Mario and Robert testified at the preliminary examination that their earlier statements to the police and prosecutor were based on the observations of others and not their personal observations. Defense counsel further noted that the investigative subpoena deposition was taken at the police precinct absent the opportunity for cross-examination. The district court agreed with the prosecutor and admitted the deposition testimony over defense counsel's objection.

Pursuant to MRE 602,

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony

Moreover, hearsay is generally inadmissible unless an exception is provided in the rules of evidence. MRE 802. "Hearsay" is defined in MRE 801(c) as "a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."

Although the investigative subpoena deposition is not inadmissible as a whole, we agree that certain statements contained within are inadmissible hearsay and/or violate the personal knowledge requirement of MRE 602. Mario made several statements identifying defendant as the shooter based on the comments of neighbors that were clearly hearsay. However, their admission through the investigative subpoena deposition was not prejudicial. Mario testified at the deposition that he saw a red convertible Corvette driving away from the scene and that he chased the car around the block and saw defendant inside the vehicle. Mario further claimed that defendant telephoned and threatened violence if the car was not returned and later called blaming the shooting on an accomplice. Given Mario's testimony identifying defendant from his personal observations, the inadmissible hearsay did not affect the outcome of defendant's trial.

The investigative subpoena deposition also includes several hearsay statements regarding defendant's possession of weapons. However, Mario also testified that he personally observed defendant with guns. Although certain statements in this regard were inadmissible, they were not prejudicial given that Mario also personally observed defendant with guns in the past.

We agree with defendant that the rumor regarding defendant's theft of vehicle rims and defendant's alleged statements to third parties promising to give Mario a new car are hearsay. However, these issues are collateral to this case. The material question is the identity of the individual who shot at the Taits' house. Although the dispute regarding the vehicle provides defendant with a motive for the shooting, the challenged statements do not link defendant to the shooting. Therefore, these statements were unlikely to affect the outcome of defendant's trial.

Because this was a bench trial, defense counsel trusted the trial judge to have the "wherewithal to realize that [the irrelevant and hearsay statements] should not be given any

weight . . .” and to realize that the statements were inadmissible. This Court approved of such a strategy in *People v Wofford*, 196 Mich App 275, 282; 492 NW2d 747 (1992) (“Unlike a jury, a judge is presumed to possess an understanding of the law, which allows him to understand the difference between admissible and inadmissible evidence or statements of counsel.”). However, defendant contends that defense counsel should have sought the redaction of the investigative subpoena deposition during the pretrial phase given that defendant may have insisted on a jury trial. Defense counsel testified at the *Ginther* hearing that defendant agreed to proceed with a bench trial before the first day of trial and, therefore, she did not need to seek the redaction of the deposition. There is no evidence of this conversation on the record, but there is also no reason to doubt the veracity of defense counsel’s assertion.

Defense counsel testified that she did not seek the redaction of the hearsay statements from the investigative subpoena deposition because they pertained only to collateral issues. Rumor regarding defendant’s theft of the vehicle rims and defendant’s alleged statements to third parties promising to give Mario a new car were collateral to the main issue in this case, i.e., identification. However, those statements placing defendant at the scene of the shooting directly relate to defendant’s identification and, therefore, are not collateral. However, Mario testified that he personally observed defendant at the scene and that defendant made threatening telephone calls to him both before and after the shooting. Given the admission of that evidence, defense counsel’s mischaracterizing of certain hearsay statements as “collateral” does not affect the outcome of the trial and does not require reversal.

The admission of certain irrelevant evidence within the investigative subpoena deposition was not prejudicial. “‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” MRE 401. “All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of Michigan, these rules, or other rules adopted by the Supreme Court. Evidence which is not relevant is not admissible.” MRE 402.

Defendant’s street name and the identity of his girlfriend were irrelevant in this case. However, the admission of this irrelevant evidence at trial had no effect on the trial court’s ultimate verdict. The fact that defendant had a street name is not a remarkable fact and had no effect on the identification of defendant as the shooter. It appears from the deposition transcript that the prosecutor questioned Mario about defendant’s girlfriend because he was trying to gather information regarding the suspect’s possible location. It is possible to infer from this testimony that defendant was attempting to evade arrest. However, it is also possible that defendant was no longer living at his prior address and that the police needed to investigate and discover his current address. In any event, defendant’s whereabouts before his arrest is a collateral issue. It does not affect Mario’s testimony identifying defendant as the shooter. Accordingly, the admission of this evidence was not outcome determinative.

Defendant also challenges defense counsel’s failure to adequately question Mario on cross-examination to highlight the inconsistencies between his trial testimony and his earlier statement to the police and investigative subpoena deposition. Generally, decisions regarding the manner of questioning witnesses are a matter of trial strategy that we will not second-guess with the benefit of hindsight. *Rockey, supra* at 76-77. However, we agree that defense counsel

employed a sound strategy in not questioning Mario further regarding the inconsistency in his testimonies.

Defense counsel repeatedly claimed that she did not cross-examine Mario in more depth because “everything was going our way.” On direct examination at trial, Mario completely denied the veracity of every statement made at the deposition. In fact, Mario denied making the statements transcribed at the investigative subpoena deposition. Defense counsel admitted at the *Ginther* hearing that the court reporter honestly transcribed the statements made at the deposition. Therefore, Mario’s denial of making those statements was not credible. Had defense counsel cross-examined Mario in more depth regarding the inconsistencies in his testimonies, defense counsel would have further highlighted the incredible claim that Mario never made the challenged statements at the investigative subpoena deposition. Since Mario’s testimony at trial was favorable to defendant, defense counsel decided to “leave it alone.”

During opening statement, defense counsel argued that Mario and Robert had not “recanted” their earlier testimony. Rather, she argued that the Taits had a “meritorious reason” for changing their testimony. Defendant contends that defense counsel prejudiced his case by failing to follow through and reveal that “meritorious reason.” At the *Ginther* hearing, defense counsel argued that she had followed through and provided a meritorious reason for the complainants’ changing their stories. Robert testified that he had not been dishonest with the police. Rather, Robert testified that he relied on the statements of “passers-by” and believed that defendant had shot at the house given their earlier conversation. Defense counsel further contended that the veracity of the complainants’ trial testimony was evinced by the fact that they appeared at trial to clear the air. Had the complainants intended to maintain their prior, untruthful statements, they could have left town. Finally, during closing argument, defense counsel highlighted that the complainants tried to tell the assistant prosecutor the truth before the preliminary examination. These arguments were sufficient to challenge the prosecutor’s allegation that the complainants perjured themselves at trial. Defense counsel provided a reasonable explanation for the complainants’ changes of heart and defendant’s challenge on appeal lacks merit.

Defendant further contends that the prosecutor engaged in prosecutorial misconduct by seeking the admission of the investigative subpoena deposition. Generally, we review prosecutorial misconduct claims on a case-by-case basis, examining any remarks in context, to determine if the defendant received a fair and impartial trial. *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001). Because defendant failed to preserve his challenge by raising a timely objection at trial, our review is limited to plain error affecting defendant’s substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

The investigative subpoena deposition was admissible at trial under MRE 801(d)(1)(A) and *Chavies, supra*. Mario gave his prior, inconsistent deposition testimony under oath and was available for cross-examination regarding that testimony at trial. A claim of prosecutorial misconduct cannot be based on the prosecutor’s presentation of admissible evidence. *People v Noble*, 238 Mich App 647, 660-661; 608 NW2d 123 (1999).

Contrary to defendant’s assertion, there is no evidence that the prosecutor encouraged the introduction of false testimony at trial. Prosecutors have a constitutional duty to report when a state witness lies under oath and “may not knowingly use false testimony to obtain a conviction.”

People v Lester, 232 Mich App 262, 276; 591 NW2d 267 (1998). During opening statement, the prosecutor argued that Robert and Mario had changed their stories since they first spoke with the police and expressed his intent to introduce those prior statements to discredit the witnesses' testimony on the stand. The prosecution presented the trial court with two versions of events provided by the witnesses at different times. It was the role of the trial court, as the trier of fact, to weigh the credibility of these statements and determine which version was true. *People v Lemmon*, 456 Mich 625; 576 NW2d 129 (1998). There simply is no evidence on the record for this Court to positively determine that Mario lied during the investigative subpoena deposition, rather than at trial.

Defendant also contends that the prosecutor improperly sought the admission of the investigative subpoena deposition without redacting the inadmissible hearsay and irrelevant statements. Even if the prosecutor should have unilaterally redacted the deposition, this error would not require reversal. Mario testified during the deposition that he personally observed defendant leaving the scene of the shooting and that defendant telephoned him both before and after the shooting threatening violence. Moreover, Mario testified that he personally observed defendant with guns in the past. Accordingly, the hearsay evidence relating to the shooter's identity and defendant's possession of guns did not affect the outcome of defendant's trial. Other issues, such as the possible theft of a vehicle and defendant's alleged promises to third-parties to give Mario a new car, were collateral to the main issue and, therefore, were unlikely to affect the trial court's verdict.

Finally, we disagree with defendant's assertion that the admission of the investigative subpoena deposition violated his right to confront the witnesses against him. The admission of a testimonial hearsay statement can amount to a violation of a defendant's Sixth Amendment right to confront the witnesses against him. *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004). In *Crawford, supra* at 61-62, 68-69, the United States Supreme Court found that testimonial hearsay statements of witnesses against the accused who are unavailable to testify at trial are inadmissible when there was no prior opportunity for cross-examination. Mario testified at trial. Therefore, regardless of whether his deposition testimony was testimonial in nature, defendant was not deprived of the opportunity to confront the witnesses against him. Accordingly, defendant's challenge on appeal lacks merit.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Michael J. Talbot
/s/ Deborah A. Servitto